

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

IN THE MATTER OF PROVISIONAL STOCKWATER)	
PERMIT NOS. 41QJ 30006070 AND 41QJ 30006071)	PROPOSAL FOR DECISION
ISSUED TO JAMES & MARJORIE PRIBYL)	

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on July 28, 2004, in Great Falls, Montana, to determine whether Beneficial Water Use Permit No. 41QJ 30006070 and Beneficial Water Use Permit No. 41QJ 30006071 already issued pursuant to the exception found at Mont. Code Ann. § 85-2-306 (3) to James and Marjorie Pribyl, hereafter Permittee, should be modified or revoked.

APPEARANCES

Permittee appeared at the hearing by and through counsel, Holly Jo Franz. James Pribyl; David Baldwin, P.G., Senior Hydrogeologist; and David Schmidt, Senior Water Rights Specialist; both with Water Rights Solutions, Inc., testified for the Permittee.

Complainant Gollaher Ranch Company, hereafter Gollaher, appeared at the hearing by and through counsel, J. Blaine Anderson, Jr. Dr. Bill Patton; Myrle Gollaher; Leonard Moug; Glen Kitson; Tom Grimes; Gary (Cork) Salo; and Bruce Anderson, Hydrologist, Land & Water Consulting; and Delight Gollaher testified for Complainant Gollaher.

Scott Irvin, Regional Manager, Lewistown Water Resources Regional Office of the Department of Natural Resources and Conservation (Department) was called to testify by the Permittee.

EXHIBITS

Both Permittee and Complainants offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Permittee offered fifteen exhibits for the record. The Hearing Examiner accepted and admitted into evidence Permittee's Exhibit Nos. 1-7 and 9-15. Permittee's Exhibit No. 8 was not admitted.

Permittee's Exhibit P1 is an 11" by 17" site map.

Permittee's Exhibit P2 consists of two pages entitled "Cascade Moisture".

Permittee's Exhibit P3 consists of a single page containing three photographs of the lower reservoir and one photograph of Willow Creek at the County Road.

Permittee's Exhibit P4 consists of one page of reservoir calculations. The circled portion at the bottom of the document is struck from the exhibit.

Permittee's Exhibit P5 consists of one page containing copies of two checks.

Permittee's Exhibit P6 is a photograph.

Permittee's Exhibit P7 consists of a one-page map showing property ownership. A copy of Exhibit P7 with a North indicator added by the Hearing Examiner is attached.

Permittee's Exhibit P8 was not admitted.

Permittee's Exhibit P9 consists of three pages of David Baldwin's professional resume.

Permittee's Exhibit P10 consists of a one page map of the Upper Pond.

Permittee's Exhibit P11 consists of five pages of David Schmidt's resume.

Permittee's Exhibit P12 consists of one page containing six photographs of the upper reservoir.

Permittee's Exhibit P13 is a photograph of the Gollaher pond.

Permittee's Exhibit P14 consists of one page containing three photographs in the Lower Pond area.

Permittee's Exhibit P15 consists of one page containing two photographs in the Lower Pond area.

Gollaher offered four exhibits for the record. The Hearing Examiner accepted and admitted into evidence Gollaher's (labeled as Objector's Exhibits) Exhibit Nos. 10, 13, 16-1 and 17.

Objector's Exhibit 10 consists of the twelve pages which have not been crossed out of the twenty pages offered of Department *General Abstracts* of Willow Creek water rights.

Objector's Exhibit 13 consists of two pages from a Department *Water Right Listing by Source Name by Priority Date*.

Objector's Exhibit 16-1 is a photograph of the Lower Pond.

Objector's Exhibit 17 is a photograph of the headgate for the Lower Pond.

PRELIMINARY MATTERS

The Hearing Examiner informed the Parties prior to the hearing that because the hearings on permits already issued are consolidated and one proposal would follow with separate findings, conclusions, and proposed orders for each permit, evidence was to be offered only once to reduce redundancy and reduce the hearing time.

Prior to the hearing a naming convention was adopted for the two ponds. Beneficial Water Use Permit No. 41QJ 30006070 is the “Lower Pond” and Beneficial Water Use Permit No. 41QJ 30006071 is the “Upper Pond”. This naming convention is also used in this Proposal. See the copy of Permittee’s Exhibit P7 with a North indicator added by the Hearing Examiner attached on page 22.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

PERMIT NO. 41QJ 30006070

FINDINGS OF FACT Permit No. 41QJ 30006070

General

1. Application for Provisional Permit For Completed Stockwater Pit Or Reservoir No. 41QJ 30006070 in the name of and signed by James D. and Marjorie F. Pribyl was filed with the Department on April 28, 2003. The project construction is complete such that the Lower Pond is capable of taking water. The Regional Office determined the Application to be correct and complete and subsequently issued a Permit. (Department file, testimony of Jim Pribyl, Scott Irvin)
2. A Permit was issued by the Department to Pribyl May 19, 2003, with a priority date of April 28, 2003 at 9:01 a.m., to appropriate in the Lower Pond up to 5.00 acre-feet of water per year from Willow Creek. The water is diverted at a point in the SW¼SE¼NE¼ of Section 29, Township 17 North, Range 01 East, Cascade County, Montana. The means of diversion is a pit. The use is stock. The place of use is SW¼SE¼NE¼ of Section 29, Township 17 North, Range 01 East, Cascade County, Montana. The period of diversion and period of use is January 1 to December 31, inclusive, of each year. The 1.25 acre-foot place of storage is on stream and is located in the SW¼SE¼NE¼ of Section 29, Township 17 North, Range 01 East, Cascade County, Montana. The Permitted volume is for four fills of the reservoir. (Department file)
3. During the testimony of Myrle Gollaher for the Complainant, Mr. Gollaher stated that the non-perennial nature of the stream was not in question. The Hearing Examiner asked Counsel for Gollaher if the non-perennial nature of the stream was an issue for this hearing and Counsel confirmed that it was not an issue. Therefore, because the stream is considered non-perennial by both Parties, this proposal will not deal further with that issue. Willow Creek in the vicinity of Permittee's ponds is non-perennial. (Testimony of Myrle Gollaher)
4. The Lewistown Water Resources Regional Office received a copy of a March 25, 2003, "call for water" from Gollaher on Permittee. Scott Irvin, Regional Manager, Lewistown Water Resources Regional Office inspected Permittee's two reservoirs on April 28, 2003. (Department file, Testimony of Scott Irvin)
5. The permitted "pit" means of diversion, and "on stream" reservoir information found on the permit are not correct. The means of diversion is a headgate and ditch. The reservoir is off stream. (Testimony of Scott Irvin)

6. Any overflow from a full Lower Pond reservoir is not diverted to any drainage other than Willow Creek. (Testimony of Scott Irvin)

7. The Lower Pond has a capacity of 0.85 acre-feet. Therefore, the total appropriation after four (4) fills is 3.4 acre-feet¹ instead of 5 acre-feet as permitted. (Department file, testimony of Jim Pribyl)

Adverse Effect

8. Complainant Gollaher has a senior existing water use from an estimated 800 acre-foot reservoir located downstream of Permittee's Upper Pond and Lower Pond which is used to store Willow Creek water for stock and irrigation purposes. See Water Right Claim No. 41QJ, 20944900, et al, Complainant's Exhibit 10. The 800 acre-foot reservoir has an overflow spillway drop tube with a top elevation 1-2 feet above the bottom of the "Upper Ditch" and a "foot valve" to release stored irrigation and stockwater from the reservoir when it is not full. All water flowing into the reservoir whenever the reservoir is not full is stored in the reservoir for later stock or irrigation use. If Permittee diverts water upstream into the Lower Pond when Willow Creek is flowing into Gollaher's reservoir and the reservoir is not full, Gollaher does not receive its senior water right. (Department file, testimony of Myrle Gollaher)

9. Irrigation use from the Gollaher reservoir occurs through the "Upper Ditch" from the reservoir when the water level in the reservoir is high enough. When the "foot valve" is closed, water will flow down the Upper Ditch before it will overflow into the drop tube. Gollaher considers, and I so find, the reservoir is full when the Upper Ditch is flowing to capacity and water is flowing into the drop tube. If Permittee diverts water upstream into the Lower Pond when Willow Creek is flowing into Gollaher's reservoir and the reservoir is not full, Gollaher does not receive its senior water right for appropriation for irrigation storage. (Department file, testimony of Myrle Gollaher)

10. Gollaher's stockwater use from the reservoir occurs from stock drinking directly from the reservoir and from releases made from the reservoir to downstream livestock use. Gollaher does not receive its senior water right for appropriation for stockwater when water is diverted to Permittee's Lower Pond and Willow Creek is flowing into Gollaher's reservoir when it is not yet full. (Testimony of Myrle Gollaher)

11. Willow Creek does not flow year round on the ground surface and typically flows only in response to spring runoff or a local precipitation event. Appropriator Kitson, who was called to

¹ 4 fills times 0.85 acre-feet per fill = 3.4 acre-feet

testify by the Complainant, has irrigation and stockwater use that is between the Lower Pond and the Upper Pond. He and others have observed, and I find, that Willow Creek typically runs through the Kitson and Salo property March through July, and in April 2004 it took five days from the time the Lower Pond headgate was closed for water to reach and flow into the Gollaher Reservoir. (Testimony of Glen Kitson, Myrle Gollaher, Cork Salo)

12. Permittee has installed a headgate to divert water from Willow Creek to each pond which is of the style used by Greenfield Irrigation District. This headgate has metal to metal contacts and there is some leakage through this contact. The headgates can be modified with plastic or dirt, or leakage can be immediately returned to Willow Creek below the headgate so when the headgate is closed, water is not lost to leakage through the headgate. (Testimony of Jim Pribyl, Myrle Gollaher)

13. Any diversion upstream of the Gollaher reservoir will reduce the amount of water downstream. However, in the case where the flow on the surface is not continuous to the Gollaher reservoir, evidence was not presented that **all** water diverted upstream from Gollaher would have ended up in the Gollaher reservoir if it had not been diverted. (Testimony of Bruce Anderson)

14. Cork Salo appropriates stockwater directly from Willow Creek downstream of the Lower Pond and upstream of the Gollaher Reservoir. Willow Creek typically flows March through July on Salo's land. When Salo pastures livestock along Willow Creek March through July, he will not receive water to fulfill his senior water right if diversion into the Lower Pond takes water which would otherwise flow to his land when he is pasturing livestock. (Testimony of Cork Salo)

15. The permitted volume of the Lower Pond is adequate to irrigate 2.5 acres at the duty of 2.0 acre-feet per acre. Thus, 2.5 acres less irrigation would occur **if** all water diverted into the Lower Pond for four fills (as permitted), or 5 acre feet, is available for downstream Gollaher irrigation. If Gollaher receives less irrigation water than that (or 5 acre-feet) because water is stored in the Lower Pond, then Gollaher is not receiving all the senior water right it is entitled to. (Testimony of David Baldwin)

16. There is no adverse effect to Gollaher from filling the Lower Pond when Willow Creek is running above the Lower Pond and when the Gollaher reservoir is full. (Testimony of David Schmidt)

17. Permittee's intent is to only divert in the "off season" which is when there is no flow on the surface below their diversion and Permittee believes the flow will not reach the Gollaher reservoir. (Testimony of Jim Pribyl)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW Permit No. 41QJ 30006070

1. The Department has jurisdiction under Mont. Code Ann. § 85-2-306(3) to automatically issue a provisional permit after construction of an impoundment for stockwater use upon receipt of a correct and complete application for a stockwater provisional permit. The Department (Regional Office) determined the Permittee's application to be correct and complete and subsequently issued Water Use Permits. Because of the discussion at hearing regarding correct and complete applications I have reviewed the application regarding correct and complete, and agree with the Regional Office's determination. Mont. Code Ann. § 85-2-306(3). See Finding of Fact Nos. 1, 2.

2. If the Department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators. Mont. Code Ann. § 85-2-306(3).

3. Prior to the hearing and after submission of briefs, it was determined in my July 23, 2004, Order that Complainant Gollaher has the burden of proof in this matter. Complainant Gollaher has the burden of proof, and has the initial burden of production to produce evidence to persuade the Hearing Examiner that they have been adversely affected. However, once Gollaher has presented evidence they have been adversely affected by Pribyl's exercise of their reservoir Permits, Pribyl has the burden of producing evidence that there is no adverse effect, **or** the effect is one under which Gollaher can reasonably exercise its senior existing appropriations so that there is no adverse effect, **or** Pribyl must offer modifications to the Permits which will prevent adverse effects to Gollaher's existing water rights. The burden of proof is on Complainant Gollaher to persuade the Hearing Examiner they have been adversely affected by the Pribyl's permitted ponds. See July 23, 2004 Order on Burden of Proof.

4. The issue of the statutory sixty (60) day deadline after completion of construction of the reservoirs within which permittee was to submit of an *Application for Provisional Permit For Completed Stockwater Pit Or Reservoir* , Mont. Code Ann. § 85-2-306(3), was raised by Gollaher. The project construction is complete such that they are capable of taking water. The Hearing Examiner infers from Gollaher's raising of the issue that they believe submittal of these Applications after sixty days is cause for revocation. Contested case hearings held on completed stockwater permits are conducted to determine if the rights of other appropriators have been or will be adversely affected by the impoundment. Mont. Code Ann. § 85-2-306(3). This section does not include a penalty for submittal outside the sixty-day period following completion. No law allows the Department to revoke a permit on the basis that the permit (and water) use may have been illegal because the application was not received within sixty days of completion of the reservoir. See Finding of Fact No. 1.

5. Complainant Gollaher asserts they are adversely affected at any time their reservoir is not full (i.e., the overflow drop tube is not conveying water through the dam). This assertion alleges adverse effect at times water is not flowing into their reservoir and their reservoir is not full. Gollaher asserts that any water diverted into the Lower Pond is water that would have previously flowed into their pond, or into the ground beneath or adjacent to the streambed above their pond. The assertion is the space previously occupied under the streambed by any water diverted into the Lower Pond is water that will have to be replaced when Willow Creek begins to flow again, thus, decreasing the amount of water getting to the Gollaher reservoir and adversely affecting their appropriation. Montana's appropriation scheme is based upon the prior appropriation doctrine. Simply stated, a junior must not divert water when the water would reach senior's headgate and senior can put the water to use. See *McDonald v. State*, 220 Mont. 519, 532, 722 P.2d 598 (1986); *Raymond v. Wimsette*, 12 Mont. 551, 560-561, 31 P. 537 (1892). Gollaher did not provide sufficient evidence this water, now missing from the streambed, ends up in their reservoir at a time they can put it to use. Gollaher showed there will be less water downstream of the Lower Pond diversion, but did not provide adequate evidence to conclude all water that goes into the streambed (i.e., does not run on the surface) makes it to the Gollaher reservoir. Salo alleged a connection between Willow Creek and nearby adjacent shallow aquifers, but Salo's observations are not sufficient evidence to show that lower levels in the aquifer are caused by Willow Creek drying up, or if they occurred as a result of seasonal water level fluctuations. Here, it has not been shown that any water 'diverted' by Permittee when water is not flowing on the surface of Willow Creek into Gollaher's reservoir would have reached the

Gollaher reservoir. When a spring in the bed of a tributary would not reach a downstream prior appropriator as the result of natural causes, it may be appropriated during such period by others. See *Leonard v Shatzer*, 11 Mont. 422, 426-427, 28 P. 457 (1892) The subsurface supply of a stream is as much a part of the stream as is the surface flow and is governed by the same rules as the above surface flow. See *Smith v Duff*, 39 Mont. 382 , 102 P.. 984 (1909). However, here there is insufficient evidence to show any subsurface flow actually ends up in the Gollaher Reservoir. There is not sufficient evidence to show that the subsurface water beneath Willow Creek would be at a different level with or without Permittee's diversion into the Lower Pond. See Finding of Fact Nos. 8, 9, 10, 11, 13.

6. When the small flow available in Willow Creek was allowed to flow downstream instead of into the Lower Pond, it took only five days to begin flowing into the Gollaher reservoir. This does not show that large volumes of water are required to replenish the streambed so water will flow on the surface into Gollaher's reservoir. I have not seen sufficient evidence to prove that if all the water above the Gollaher reservoir were left in Willow Creek, even when it is not running on the surface, it would make it to the Gollaher reservoir either above or below ground. Without such a showing, it would be contrary to established case law to find adverse effect by the upstream use based upon its alleged adverse effect on subsurface water. See *Raymond v Wimsette*, 12 Mont. 551, 31 P. 537 (1892). See Finding of Fact Nos. 11, 13, 14, 16.

7. Gollaher and other appropriators will be adversely affected if the Permittee takes water for the Lower Pond when the stream is flowing at Gollaher's reservoir and Gollaher's reservoir is not yet full. There will be no adverse effect to Gollaher if Permittee does not divert until water has ceased flowing on the surface at Permittee's downstream property boundary when Salo has livestock needs, or has ceased flowing into the Gollaher reservoir if Salo has no stock needs, and Permittee closes their headgate when Willow Creek dries up at their headgate (to await the next runoff event to see if it will produce enough water to flow on the surface of Willow Creek to Salo and Gollaher). Permittee's headgates must be maintained so there is no leakage through the headgate, or any leakage is immediately routed back to Willow Creek below the headgate. This means of diversion requirement assures Permittee only takes water after the other senior appropriators' rights have naturally stopped receiving water. See Finding of Fact Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17.

8. Prior to the hearing in correspondence and during the hearing Gollaher implied that if the Permittee's ponds are allowed to remain in use a condition was needed which would allow

Gollaher unrestricted access for visual inspection to verify that water is not being diverted until after Gollaher's reservoir has filled in accordance with their prior appropriation. I find no authority which would allow me to allow a Party unrestricted access to Permittee's land. However, an employee of the Department may enter upon any land, after reasonable notice is given, to make inspections considered necessary to ascertain whether or not persons are complying with Mont. Code Ann. Title 85 Chapter 2. See Mont. Code Ann. § 85-2-115. Another allocation tool is provided through the appointment of a water commissioner. See Mont. Code Ann. § 85-2-406. Here, it appears that through the Department's complaint process a timely inspection was made by the Lewistown Water Resources Regional Office. I cannot provide for inspection conditions dealing with land entry when it is already authorized by statute to be done by the Department, and there is no authority for private access. See Finding of Fact No. 4.

9. The Department may modify a permit subject to terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators. Here, there are further conditions required to protect senior appropriators, and therefore the Permittee will take water only **after** other senior appropriators' needs have been fulfilled, or water is no longer available to them because Willow Creek is dried up, which will protect the rights of the other appropriators. Mont. Code Ann. § 85-2-306(3). See Conclusions of Law Nos. 2, 7.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law , the Hearing Examiner makes the following:

PROPOSED ORDER Permit No. 41QJ 30006070

Subject to the terms, conditions, restrictions, and limitations listed below, Permit No. 41QJ 30006070 is modified as follows: A Permit is re-issued to appropriate up to 3.4 acre-feet of water per year from Willow Creek. The water is diverted at a point in the SW¼SE¼NE¼ of Section 29, Township 17 North, Range 01 East, Cascade County, Montana. The means of diversion is a headgate and ditch. The use is stock. The place of use is SW¼SE¼NE¼ of Section 29, Township 17 North, Range 01 East, Cascade County, Montana. The period of diversion and period of use is January 1 to December 31, inclusive, of each year. The 0.85 acre-foot place of storage is off stream located in the SW¼SE¼NE¼ of Section 29, Township 17 North, Range 01 East, Cascade County, Montana. The place of storage may be filled up to four times.

- A. Permittee shall not divert when Willow Creek water flows on the surface into the Gollaher reservoir and the Gollaher reservoir is not full. Contact with Gollaher or its successor may be necessary to meet this condition.
- B. When Salo or his successor (immediate downstream appropriator below Lower Pond Permit No. 41QJ 30006070) has livestock in downstream pastures through which Willow Creek flows, Permittee shall not divert unless Willow Creek water has ceased flowing on the surface at Permittee's downstream property boundary located in the SE¼NE¼ of Section 29, Township 17 North, Range 01 East, Cascade County, Montana. At times Salo or his successor in interest has no livestock in downstream pastures through which Willow Creek flows or there is water flowing past the boundary with Salo or his successor for stockwater, this condition does not apply. Contact with Salo or his successor may be necessary to meet this condition.
- C. Permittee shall close their headgate at such time Willow Creek dries up at their Lower Pond headgate to await the next runoff event to see if it will produce enough water to flow on the surface to Salo and Gollaher. Permittee must wait 5 days after water appears at his headgate to see if the event has produced enough water to flow on the surface into the Gollaher reservoir.
- D. Permittee's headgate must be maintained so there is no leakage through the headgate, or any leakage that cannot be prevented is immediately routed back to Willow Creek below the headgate.

PERMIT NO. 41QJ 30006071

FINDINGS OF FACT Permit No. 41QJ 30006071

General

18. Application for Provisional Permit For Completed Stockwater Pit Or Reservoir No. 41QJ 30006071 in the name of and signed by James D. and Marjorie F. Pribyl was filed with the Department on April 28, 2003. The project construction is complete such that the Upper Pond is capable of taking water. The Regional Office determined the “work” copy of the Application to be correct and complete and subsequently issued a Permit. The work copy is where Department staff documents changes it makes to an application during processing. Here, the Department staff lined out “two springs” and “bottom of reservoir” on the application based upon information found on Applicant’s map. (Department file, testimony of Jim Pribyl, Scott Irvin)

19. A Permit was issued by the Department to Pribyl May 19, 2003, with a priority date of April 28, 2003 at 9:02 a.m., to appropriate in the Upper Pond up to 11.20 acre-feet of water per year from an Unnamed Tributary of Willow Creek. The water is diverted at a point in the NE¼NW¼NE¼ of Section 06, Township 16 North, Range 01 East, Cascade County, Montana. The means of diversion is a pit. The use is stock. The place of use is NE¼NW¼NE¼ of Section 06, Township 16North, Range 01 East, Cascade County, Montana. The period of diversion and period of use is January 1 to December 31, inclusive, of each year. The 5.6 acre-foot place of storage is on stream and is located in the NE¼NW¼NE¼ of Section 06, Township 16 North, Range 01 East, Cascade County, Montana. The Permitted volume is for two fills of the reservoir. (Department file)

20. During the testimony of Myrle Gollaher for the Complainant, Mr. Gollaher stated that the non-perennial nature of the stream was not in question. The Hearing Examiner asked Counsel for Gollaher if the non-perennial nature of the stream was an issue for this hearing and Counsel confirmed that it was not an issue. Therefore, because the stream is considered non-perennial by both Parties, this proposal will not deal further with that issue. Willow Creek in the vicinity of Permittee’s ponds is non-perennial. (Testimony of Myrle Gollaher)

21. The Lewistown Water Resources Regional Office received a copy of a March 25, 2003, “call for water” from Gollaher on Permittee. Scott Irvin, Regional Manager, Lewistown Water Resources Regional Office inspected Permittee’s two reservoirs on April 28, 2003. (Department file for Application for Provisional Permit For Completed Stockwater Pit Or Reservoir No. 41QJ 30006070, Testimony of Scott Irvin)

22. The “Unnamed Tributary of Willow Creek” source, “pit” means of diversion, and “on stream” reservoir information found on the Permit are not correct. The source is Willow Creek. The means of diversion is a headgate and ditch. The reservoir is off stream. (Testimony of Scott Irvin)

23. The overflow from the Upper Pond reservoir when full returns to Willow Creek via a ditch. (Testimony of Scott Irvin, Leonard Moug)

24. The Upper Pond is has a capacity of 11.44 acre-feet. Therefore, the total appropriation after two (2) fills is 22.88 acre-feet² instead of 11.2 acre-feet as permitted. (Department file, testimony of Jim Pribyl)

Adverse Effect

25. Appropriator Kitson’s diversions to irrigation and instream stock use from Willow Creek are between the Upper and Lower ponds. Therefore, only diversions to the Upper Pond can affect these water rights. (Testimony of Glen Kitson)

26. Complainant Gollaher has a senior existing water use from an estimated 800 acre-foot reservoir (estimated capacity) located downstream of Permittee’s Upper Pond and Lower Pond which is used to store Willow Creek water for stock and irrigation purposes. See Water Right Claim No. 41QJ, 20944900, et al, Complainant’s Exhibit 10. The 800 acre-foot reservoir has an overflow spillway drop tube with a top elevation 1-2 feet above the bottom of the “Upper Ditch” and a “foot valve” to release stored irrigation and stockwater from the reservoir when it is not full. All water flowing into the reservoir whenever the reservoir is not full is stored in the reservoir for later stock or irrigation use. If Permittee diverts water upstream into the Upper Pond when Willow Creek is flowing into Gollaher’s reservoir and the reservoir is not full, Gollaher does not receive its senior water right. (Department file, testimony of Myrle Gollaher)

27. Irrigation use from the Gollaher reservoir occurs through the “Upper Ditch” from the reservoir when the water level in the reservoir is high enough. When the “foot valve” is closed, water will flow down the Upper Ditch before it will overflow into the drop tube. Gollaher considers, and I so find, the reservoir is full when the Upper Ditch is flowing to capacity and water is flowing into the drop tube. If Permittee diverts water upstream into the Upper Pond when Willow Creek is flowing into Gollaher’s reservoir and the reservoir is not full, Gollaher does not receive its senior water right for appropriation for irrigation storage. (Department file, testimony of Myrle Gollaher)

² 2 fills times 11.44 acre-feet per fill = 22.88 acre-feet

28. Gollaher's stockwater use from the reservoir occurs from stock drinking directly from the reservoir and from releases made from the reservoir to downstream livestock use. Gollaher does not receive its senior water right for appropriation for stockwater when water is diverted to Permittee's Upper Pond and Willow Creek is flowing into Gollaher's reservoir when it is not yet full. (Testimony of Myrle Gollaher)

29. Willow Creek does not flow year round on the ground surface and typically flows only in response to spring runoff or a local precipitation event. Appropriator Kitson, who was called to testify by the Complainant, has irrigation and stockwater use that is between the Lower Pond and the Upper Pond. He and others have observed, and I find, that Willow Creek typically runs through the Kitson and Salo property March through July, and in April 2004 it took five days from the time the Lower Pond headgate was closed for water to reach and flow into the Gollaher Reservoir. (Testimony of Glen Kitson, Myrle Gollaher, Cork Salo)

30. Permittee has installed a headgate to divert water from Willow Creek which is of the style used by Greenfield Irrigation District. This headgate has metal to metal contacts and there is some leakage through this contact. The headgates can be modified with plastic or dirt, or leakage can be immediately returned to Willow Creek below the headgate so when the headgate is closed, water is not lost to leakage through the headgate. (Testimony of Jim Pribyl, Myrle Gollaher)

31. Any diversion upstream of the Gollaher reservoir will reduce the amount of water downstream. However, in the case where the flow on the surface is not continuous to the Gollaher reservoir, evidence was not presented that **all** water diverted upstream from Gollaher would have ended up in the Gollaher reservoir if it had not been diverted. (Testimony of Bruce Anderson)

32. Cork Salo appropriates stockwater from Willow Creek downstream of the Lower Pond and upstream of the Gollaher Reservoir. Willow Creek typically flows March through July on Salo's land. When Salo pastures livestock along Willow Creek March through July, he will not receive water to fulfill his senior water right if diversion into the Upper Pond takes water which would otherwise flow to his land when he is pasturing livestock. (Testimony of Cork Salo)

33. The permitted volume of the Upper Pond is adequate to irrigate 5.6 acres at the rate of 2.0 acre-feet per acre. Thus, 5.6 acres less irrigation would occur **if** all water diverted into the Upper Pond for two fills (as permitted), or 11.2 acre-feet, is available for downstream Gollaher irrigation. If Gollaher receives less irrigation water than that (or 11.2 acre-feet) because water is

stored in the Lower Pond, then Gollaher is not receiving all the senior water right it is entitled to. (Testimony of David Baldwin)

34. Willow Creek typically flows in upstream reaches and downstream reaches from March through July. (Testimony of Glen Kitson, Cork Salo)

35. There is no adverse effect to Gollaher from filling the Upper Pond when Willow Creek is running above the Lower Pond when the Gollaher reservoir is full. (Testimony of David Schmidt)

36. Permittee's intent is to only divert in the "off season" which Permittee considers late fall or winter when diversion will cause little impact on downstream appropriators. Complainant Gollaher made an offer of proof regarding hearsay testimony. Complainant Gollaher allowed a witness with some firsthand knowledge to leave the hearing. Gollaher had another witness who knew what the absent witness was going to testify about and wanted the remaining witness to be allowed to testify to what the absent witness was going to say. Objection to such hearsay testimony was sustained because the witness with first hand knowledge was not available for cross-examination. (Testimony of Jim Pribyl)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW Permit No. 41QJ 30006071

10. The Department has jurisdiction under Mont. Code Ann. § 85-2-306(3) to automatically issue a provisional permit after construction of an impoundment for stockwater use upon receipt of a correct and complete application for a stockwater provisional permit. The Department (Regional Office) determined the Permittee's application to be correct and complete and subsequently issued Water Use Permits. There was discussion of whether the application for the Upper Pond was correct and complete as required by statute. The Hearing Examiner infers from the discussion that Complainant Gollaher believes that because the application for the Upper Pond listed two springs in the bottom of the reservoir which was later crossed out, that the application was not correct and complete and the Permit should be revoked for that reason. The phrase "correct and complete" is defined in statute. "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information." Mont. Code Ann. § 85-2-102(6). The Lewistown Water Resources Regional Office is the entity with jurisdiction to decide the issue of correct and complete. Here

the Lewistown Regional Office made the determination. Because of the discussion at hearing regarding correct and complete applications I have reviewed the application regarding correct and complete, and agree with the Regional Office's determination. Mont. Code Ann. § 85-2-306(3). See Finding of Fact Nos. 18, 19.

11. If the Department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators. Mont. Code Ann. § 85-2-306(3).

12. Prior to the hearing and after submission of briefs, it was determined in my July 23, 2004, Order that Complainant Gollaher has the burden of proof in this matter. Complainant Gollaher has the burden of proof, and has the initial burden of production to produce evidence to persuade the Hearing Examiner that they have been adversely affected. However, once Gollaher has presented evidence they have been adversely affected by Pribyl's exercise of their reservoir Permits, Pribyl has the burden of producing evidence that there is no adverse effect, **or** the effect is one under which Gollaher can reasonably exercise its senior existing appropriations so that there is no adverse effect, **or** Pribyl must offer modifications to the Permits which will prevent adverse effects to Gollaher's existing water rights. The burden of proof is on Complainant Gollaher to persuade the Hearing Examiner they have been adversely affected by the Pribyl's permitted ponds. See July 23, 2004 Order on Burden of Proof.

13. The issue of the statutory sixty (60) day deadline after completion of construction of the reservoirs within which permittee was to submit of an *Application for Provisional Permit For Completed Stockwater Pit Or Reservoir*, Mont. Code Ann. § 85-2-306(3), was raised by Gollaher. The project construction is complete such that they are capable of taking water. The Hearing Examiner infers from Gollaher's raising of the issue that they believe submittal of these Applications after sixty days is cause for revocation. Contested case hearings held on completed stockwater permits are conducted to determine if the rights of other appropriators have been or will be adversely affected by the impoundment. Mont. Code Ann. § 85-2-306(3). This section does not include a penalty for submittal outside the sixty-day period following completion. No law allows the Department to revoke a permit on the basis that the permit (and water) use may have been illegal because the application was not received within sixty days of completion of the reservoir. See Finding of Fact No. 18.

14. Downstream Appropriator Kitson will be adversely affected by diversion to the Upper Pond when water is flowing on the surface in Willow Creek at the location of Kitson's irrigation and instream stock use. See Finding of Fact No. 25, 29.

15. Complainant Gollaher asserts they are adversely affected at any time their reservoir is not full (i.e., the overflow drop tube is not conveying water through the dam). This assertion alleges adverse effect at times water is not flowing into their reservoir and their reservoir is not full. Gollaher asserts that any water diverted into the Upper Pond is water that would have previously flowed into their pond, or into the ground beneath or adjacent to the streambed above their pond. The assertion is the space previously occupied under the streambed by any water diverted into the Upper Pond is water that will have to be replaced when Willow Creek begins to flow again, thus, decreasing the amount of water getting to the Gollaher reservoir and adversely affecting their appropriation. Montana's appropriation scheme is based upon the prior appropriation doctrine. Simply stated, a junior must not divert water when the water would reach senior's headgate **and** senior can put the water to use. See *McDonald v. State*, 220 Mont. 519, 532, 722 P.2d 598 (1986); *Raymond v. Wimsette*, 12 Mont. 551, 560-561, 31 P. 537 (1892). Gollaher did not provide sufficient evidence this water, now missing from the streambed, ends up in their reservoir at a time they can put it to use. Gollaher showed there will be less water downstream of the Upper Pond diversion, but did not provide adequate evidence to conclude all water that goes into the streambed (i.e., does not run on the surface) makes it to the Gollaher reservoir. Salo alleged a connection between Willow Creek and nearby adjacent shallow aquifers, but Salo's observations are not sufficient evidence to show that lower levels in the aquifer are caused by Willow Creek drying up, or if they occurred as a result of seasonal water level fluctuations. Here, it has not been shown that any water 'diverted' by Permittee when water is not flowing on the surface of Willow Creek into Gollaher's reservoir would have reached the Gollaher reservoir. When a spring in the bed of a tributary would not reach a downstream prior appropriator as the result of natural causes, it may be appropriated during such period by others. See *Leonard v Shatzer*, 11 Mont. 422, 426-427, 28 P. 457 (1892) The subsurface supply of a stream is as much a part of the stream as is the surface flow and is governed by the same rules as the above surface flow. See *Smith v Duff*, 39 Mont. 382, 102 P. 984 (1909). However, here there is insufficient evidence to show any subsurface flow actually ends up in the Gollaher Reservoir. There is not sufficient evidence to show that the subsurface water beneath Willow Creek would be at a different level with or without Permittee's diversion into the Upper Pond. See Finding of Fact Nos. 26, 27, 28, 29, 30, 31.

16. When the small flow available in Willow Creek was allowed to flow downstream instead of into the Lower Pond, it took only five days to begin flowing into the Gollaher reservoir. This does not show that large volumes of water are required to replenish the streambed so water will flow on the surface into Gollaher's reservoir. I have not seen sufficient evidence to prove that if all the water above the Gollaher reservoir were left in Willow Creek, even when it is not running on the surface, it would make it to the Gollaher reservoir either above or below ground. Without such a showing, it would be contrary to established case law to find adverse effect by the upstream use based upon its alleged adverse effect on subsurface water. See *Raymond v Wimsette*, 12 Mont. 551, 31 P. 537 (1892). See Finding of Fact Nos. 31, 34.

17. Gollaher and other appropriators will be adversely affected if the Permittee takes water for the Upper Pond when the stream is flowing at Gollaher's reservoir and Gollaher's reservoir is not yet full. There will be no adverse effect to Gollaher if Permittee does not divert until water has ceased flowing on the surface at Permittee's downstream property boundary when Salo has livestock needs, or has ceased flowing into the Gollaher reservoir if Salo has no stock needs, and Permittee closes their headgate when Willow Creek dries up at their headgate (to await the next runoff event to see if it will produce enough water to flow on the surface of Willow Creek to Salo and Gollaher). Permittee's headgates must be maintained so there is no leakage through the headgate, or any leakage is immediately routed back to Willow Creek below the headgate. This means of diversion requirement assures Permittee only takes water after the other appropriators' rights have naturally stopped receiving water. See Finding of Fact Nos. 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36.

18. Prior to the hearing in correspondence and during the hearing Gollaher implied that if the Permittee's ponds are allowed to remain in use a condition was needed which would allow Gollaher unrestricted access for visual inspection to verify that water is not being diverted until after Gollaher's reservoir has filled in accordance with their prior appropriation. I find no authority which would allow me to allow a Party unrestricted access to Permittee's land. However, an employee of the Department may enter upon any land, after reasonable notice is given, to make inspections considered necessary to ascertain whether or not persons are complying with Mont. Code Ann. Title 85 Chapter 2. See Mont. Code Ann. § 85-2-115. Another allocation tool is provided through the appointment of a water commissioner. See Mont. Code Ann. § 85-2-406. Here, it appears that through the Department's complaint process a timely inspection was made by the Lewistown Water Resources Regional Office. I cannot provide for

inspection conditions dealing with land entry when it is already authorized by statute to be done by the Department, and there is no authority for private access. See Finding of Fact No. 20.

19. The Department may modify a permit subject to terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators. Here, there are further conditions required to protect senior appropriators, and therefore the Permittee will take water only **after** other senior appropriators' needs have been fulfilled, or water is no longer available to them because Willow Creek is dried up, which will protect the rights of the other appropriators. Mont. Code Ann. § 85-2-306(3). See Conclusions of Law Nos. 11, 17.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER Permit No. 41QJ 30006071

Subject to the terms, conditions, restrictions, and limitations listed below, Permit No. 41QJ 30006071 is modified as follows: A Permit is re-issued to appropriate up to 22.88 acre-feet of water per year from Willow Creek. The water is diverted at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 06, Township 16 North, Range 01 East, Cascade County, Montana. The means of diversion is a headgate. The use is stock. The place of use is NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 06, Township 16 North, Range 01 East, Cascade County, Montana. The period of diversion and period of use is January 1 to December 31, inclusive, of each year. The 11.44 acre-foot place of storage is on stream located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 06, Township 16 North, Range 01 East, Cascade County, Montana. The place of storage may be filled up to two times.

A. Permittee shall not divert when Willow Creek water flows on the surface into the Gollaher reservoir and the Gollaher reservoir is not full. Contact with Gollaher or its successor may be necessary to meet this condition.

B. When Salo or his successor has livestock in downstream pastures through which Willow Creek flows, Permittee shall not divert unless Willow Creek water has ceased flowing on the surface at Permittee's downstream property boundary located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29, Township 17 North, Range 01 East, Cascade County, Montana. At times Salo or his successor in interest (immediate downstream appropriator below Lower Pond Permit No. 41QJ 30006070) has no livestock in downstream pastures through which Willow Creek flows or there is water flowing past the boundary with Salo or his successor for stockwater, this condition does not apply.

C. When Kitson or his successor (immediate downstream appropriator below Upper Pond Permit No. 41QJ 30006071) has livestock in downstream pastures through which Willow Creek flows, Permittee shall not divert until Willow Creek water has ceased flowing on the surface at Permittee's downstream property boundary located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 31, Township 17 North, Range 01 East, Cascade County, Montana. At times Kitson or his successor in interest has no livestock in downstream pastures through which Willow Creek flows or there is water flowing past the boundary with Kitson or his successor for stockwater, this condition does not apply.

D. Permittee shall close their headgate at such time Willow Creek dries up at their Upper Pond headgate to await the next runoff event to see if it will produce enough water to flow on the surface to Gollaher. Permittee must wait 5 days after water appears at his Lower Pond headgate to see if the event has produced enough water to flow on the surface into the Gollaher reservoir.

E. Permittee's headgate must be maintained so there is no leakage through the headgate, or any leakage that cannot be prevented is immediately routed back to Willow Creek below the headgate.

NOTICE

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by **October 13, 2004**, or postmarked by the same date, and copies mailed by that same date to all parties.

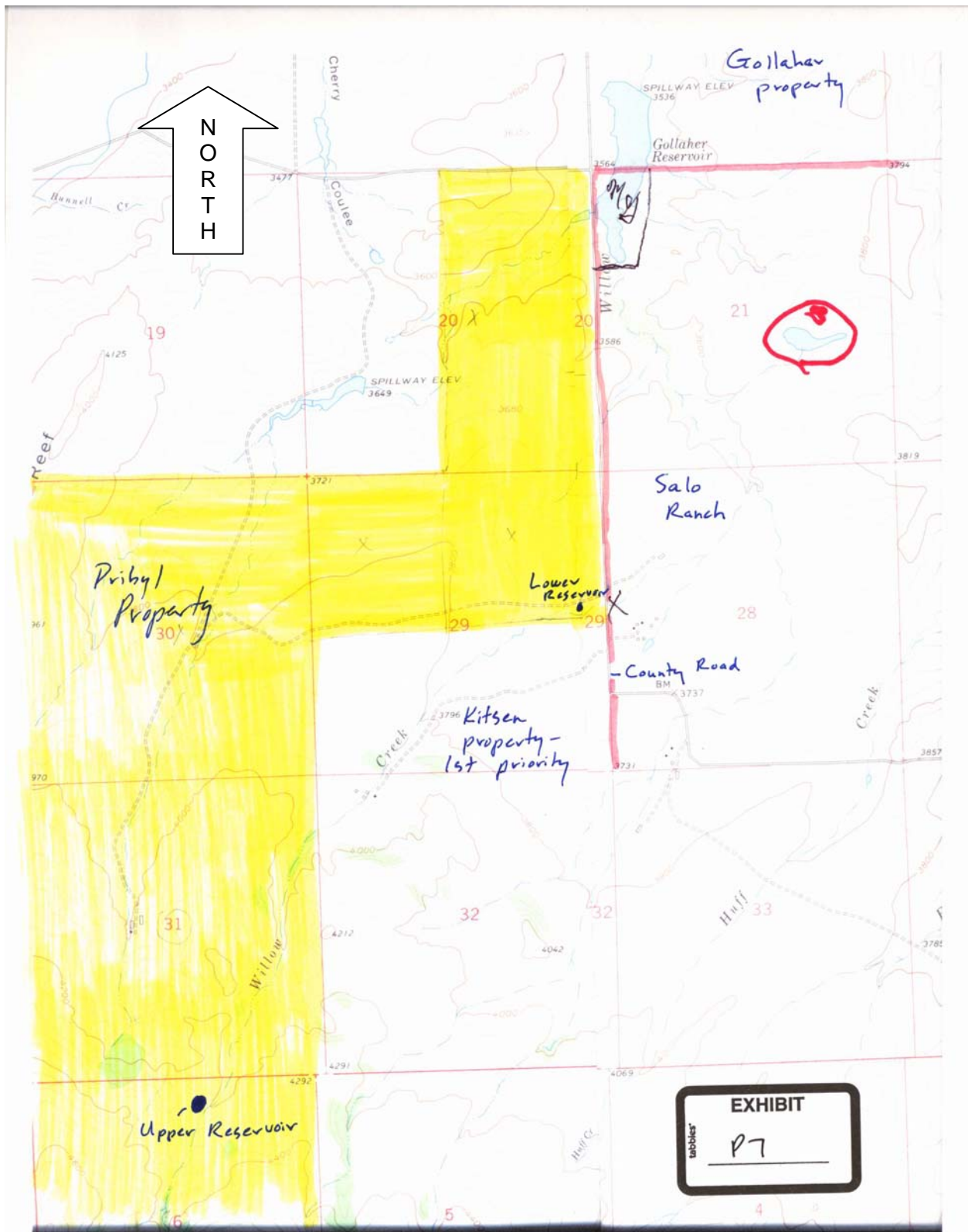
Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by **November, 3, 2004**, or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the above time periods, and due consideration of *timely* oral argument requests, exceptions, responses, and briefs.

Dated this 23rd day of September 2004.

Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

Att: Scanned Copy of Permittee's Exhibit #P7



Scanned Copy of Permittee Exhibit P7 (with a North indicator added by the Hearing Examiner)

CERTIFICATE OF SERVICE

THIS CERTIFIES THAT A TRUE AND CORRECT COPY OF THE PROPOSAL FOR
DECISION WAS SERVED UPON ALL PARTIES LISTED BELOW ON THIS ____ DAY OF
_____, 2004 BY FIRST CLASS UNITED STATES MAIL.

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